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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

BORAN YUN et al.,	
Plaintiffs and Appellants,	G049770
v.	(Super. Ct. No. 30-2013-00635551)
JPMORGAN CHASE BANK, N.A., et al.,	O P I N I O N
Defendants and Respondents.	

Appeal from judgments of the Superior Court of Orange County, Thierry P. Colaw, Judge. Affirmed.

JHK Law Group and Jae H. Kim for Plaintiffs and Appellants.

Bryan Cave, Sean D. Muntz, Thomas Nanney and Allan P. Bareng for Defendant and Respondent JPMorgan Chase Bank, N.A.

Green & Hall, Robert L. Green and Stephanie M. Cone for Defendants and Respondents Opes Investments, Inc. and Hayden Pak.

* * *

Plaintiffs Boran Yun and Jong Kim appeal from judgments dismissing their action against defendants JPMorgan Chase Bank, N.A. (Chase), Opes Investments, Inc. (Opes), and Hayden Pak after the court sustained without leave to amend defendants' demurrers to plaintiffs' operative complaint. Plaintiffs contend a substitution of trustee was invalid because it was signed by the lender's agent and that the foreclosure sale was therefore void. We disagree and affirm the judgments of dismissal.

FACTS

The Second Amended Complaint

Accepting "as true all material allegations of the complaint" (*Bernson v. Browning-Ferris Industries* (1994) 7 Cal.4th 926, 929), including allegations properly pleaded on information and belief (*Campbell-Kawannanakoa v. Campbell* (1907) 152 Cal. 201, 206), together with facts subject to judicial notice (*Rosen v. St. Joseph Hospital of Orange County* (2011) 193 Cal.App.4th 453, 456), we draw the following facts from plaintiffs' second amended complaint (SAC).

Yun and Kim are married and at all relevant times resided in a home in La Palma, California (the Home). In 2007, Yun obtained a loan secured by a deed of trust (the deed of trust) from Washington Mutual Bank, FA (Washington Mutual) to finance the Home.[1]

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[1] The first two pages of the deed of trust were attached to and incorporated by reference into the SAC. Chase requested the court below to take judicial notice of the entire deed of trust. Although the record does not contain the court's express grant of Chase's request, it appears from the court's minute order sustaining Chase's demurrer that the court did take judicial notice of the deed of trust. Moreover, plaintiffs' opening brief on appeal cites section 24 of the deed of trust on pages 13 and 14 of the deed of trust to support their allegation that only the lender was authorized to substitute a trustee.

In 2011, Chase acquired Washington Mutual. Chase transferred its beneficial interest in the deed of trust "into a Pooling and Service Agreement," under which Chase was the "'servicer.'" Chase advised Yun her loan "'was sold into a public security managed by'" Chase, and that Chase, as "the servicer of [the] loan, [was] authorized by the security to handle any related concerns on their behalf."

Chase executed a substitution of trustee document (the SOT) purporting to name National Default Servicing Corporation (National) as the new trustee under the deed of trust.[2]

In August 2011, National executed a notice of default as agent for Chase. In November 2012, National executed a notice of trustee's sale purporting to be the appointed trustee.

On February 7, 2013 National and Chase conducted a trustee's sale in which Opes and Pak purchased the Home.

Plaintiffs' wrongful foreclosure cause of action alleged the SOT executed by Chase, which purported to name National as the new trustee under the deed of trust, was void because Chase was merely the loan's servicer. Plaintiffs' unfair business practices cause of action alleged Chase acted as beneficiary and trustee without the legal authority to do so, and failed to disclose the principal for whom the documents were executed and recorded. Plaintiffs' cancellation of instruments cause of action alleged the service and filing of the notice of default and notice of trustee's sale violated the Civil Code and rendered the trustee's sale void. Plaintiffs' abuse of process cause of action was against defendant Pak only and alleged Pak, in an unlawful detainer action, "filed two false declarations for the improper purpose of retribution against Plaintiffs for contesting his taking of their Home."

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[2] The SOT was attached to and incorporated by reference into the SAC.

Demurrers to the SAC

Chase demurred on grounds the SAC failed to allege facts sufficient to state a cause of action for wrongful foreclosure, unfair business practices, or cancellation of instruments. Chase also alleged plaintiffs lacked standing, Kim is not a party to the loan or an owner of the Home, and Yun has not pleaded tender. Chase also alleged each of plaintiffs' causes of action failed for independent reasons.

Opes and Pak demurred on grounds the SAC failed to allege facts sufficient to state a cause of action for cancellation of instruments.

The Court's Ruling

The court sustained defendants' demurrers without leave to amend for, inter alia, the following stated reasons:

Kim lacked standing because he is not a party to the loan.

As to the wrongful foreclosure cause of action, a foreclosing party need not demonstrate ownership of the promissory note, or whether the owner of the note authorized the foreclosure process. Plaintiffs misinterpreted Civil Code section 2934a, subdivision (d),[3] because the judicially noticeable documents and alleged facts show Chase, the loan servicer, was acting as an authorized agent and was therefore allowed to execute the SOT. Defendants' judicially noticeable documents establish a proper chain of title and therefore plaintiffs cannot test whether the person initiating the foreclosure had the authority to do so. And plaintiffs have failed to tender.

As to the unfair business practices cause of action, the SAC does not allege plaintiffs have not defaulted on the loan. Plaintiffs failed to allege sufficient facts with reasonable particularity showing an unlawful, unfair, and/or fraudulent business act or practice. And plaintiffs have failed to tender.

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[3] All statutory references are to the Civil Code unless otherwise stated.

As to the third and fourth causes of action for cancellation of instruments and abuse of process, the court construed the demurrers to be motions to strike and struck both claims because plaintiffs added them to the SAC as new causes of action without prior leave of court.

DISCUSSION

Standard of Review

"'Because a demurrer both tests the legal sufficiency of the complaint and involves the trial court's discretion, an appellate court employs two separate standards of review on appeal.'" (*Filet Menu, Inc. v. Cheng* (1999) 71 Cal.App.4th 1276, 1279.) First, we review the complaint de novo to determine whether it alleges sufficient facts to state a cause of action under any legal theory. (*Id.* at p. 1280.) We treat the demurrer as admitting all properly pleaded and judicially noticeable material facts, "'but not contentions, deductions or conclusions of fact or law.'" (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) "[W]e give the complaint a reasonable interpretation, reading it as a whole and its parts in their context." (*Ibid.*) "[I]ts allegations must be liberally construed, with a view to substantial justice between the parties." (Code Civ. Proc., § 452.) The "plaintiff bears the burden of demonstrating that the trial court erroneously sustained the demurrer as a matter of law" and "must show the complaint alleges facts sufficient to establish every element of [the] cause of action." (*Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 43.)

"'Second, if a trial court sustains a demurrer without leave to amend, appellate courts determine whether or not the plaintiff could amend the complaint to state a cause of action.'" (*Filet Menu, Inc. v. Cheng*, *supra*, 71 Cal.App.4th at p. 1280.) If there is a reasonable possibility the defect can be cured by amendment, the trial court abused its discretion by sustaining the demurrer. (*Blank v. Kirwan*, *supra*, 39 Cal.3d at p.

318.) "The burden of proving such reasonable possibility is squarely on the plaintiff." (*Ibid.*)

The Court Properly Sustained the Demurrers to the SAC Without Leave to Amend

The SAC alleged the SOT (naming National as the successor trustee) was void because Chase signed it as the beneficiary, rather than as an agent of the public security managed by Chase. The SAC alleged that, consequently, the foreclosure documents signed by National as trustee were void and the foreclosure sale was void. From these core allegations flow the first through the third causes of action.[4]

Plaintiffs ground their allegations on two basic assertions. First, under section 24 of the deed of trust, only the "Lender" itself, *not* an agent of the lender, is authorized to appoint a successor trustee. Second, Chase's execution of the SOT as the beneficiary under the deed of trust, rather than as an agent of the beneficiary, rendered the SOT invalid and ineffective.

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[4] In addition to the wrongful foreclosure claim, the SAC's second and third causes of action are also grounded on the premise that National was not a trustee authorized to take foreclosure actions. The third cause of action for cancellation of instruments sought a court order cancelling the notice of default, notice of trustee's sale, and trustee's deed upon sale. The second cause of action for unfair business practices centers predominantly on the allegedly invalid SOT, but also asserts Chase failed to disclose the principal in violation of section 1095. Section 1095, which is *not* a nonjudicial foreclosure statute, provides: "When an attorney in fact executes an instrument transferring an estate in real property, he must subscribe the name of his principal to it, and his own name as attorney in fact." As we shall discuss, National validly acted as the trustee, not as an attorney in fact.

The SAC's fourth cause of action for abuse of process against defendant Pak asserts he filed two false declarations in a separate unlawful detainer action against plaintiffs. The court properly construed Chase's demurrer to be a motion to strike (*Sole Energy Co. v. Petrominerals Corp.* (2005) 128 Cal.App.4th 187, 193; Code Civ. Proc., § 436) and struck the claim because plaintiffs added it to the SAC as a new cause of action without prior leave of court (*People ex rel. Dept. Pub. Wks. v. Clausen* (1967) 248 Cal.App.2d 770, 786.)

1. *Section 24 of the Deed of Trust*

Section 24 of the deed of trust provides: "24. Substitute Trustee. Lender, at its option, may from time to time appoint a successor trustee to any Trustee appointed hereunder by an instrument executed and acknowledged by Lender and recorded in the office of the Recorder of the county in which the Property is located. . . . Without conveyance of the Property, the successor trustee shall succeed to all the title, powers and duties conferred upon the Trustee herein and by Applicable Law. This procedure for substitution of trustee shall govern to the exclusion of other provisions for substitution."

Plaintiffs interpret section 24 of the deed of trust as authorizing only the lender, not an agent of the lender, to appoint a successor trustee. They note that the deed of trust identifies Washington Mutual as the "Lender," "*without* reference to any agent." They argue the deed of trust must be construed against the drafter. They remind us the SAC's allegations must be accepted as true at the demurrer stage "[n]o matter how unlikely or improbable," citing *Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604. Plaintiffs argue their interpretation of the deed of the trust "must be accepted as correct in testing the sufficiency of the complaint," relying on *Aragon-Haas v. Family Security Services, Inc.* (1991) 231 Cal.App.3d 232, 239 (*Aragon*), which states: "'[W]here an ambiguous contract is the basis of an action, it is proper, if not essential, for a plaintiff to allege its own construction of the agreement. So long as the pleading does not place a clearly erroneous construction upon the provisions of the contract, in passing upon the sufficiency of the complaint, we must accept as correct plaintiff's allegations as to the meaning of the agreement.'"

"Whether a contract is ambiguous is a question of law." (*Aragon*, *supra*, 231 Cal.App.3d at p. 239.) As we shall explain, section 24 of the deed of trust is *not* ambiguous and, furthermore, plaintiffs' construction of it is "clearly erroneous." (*Ibid.*)

As a practical matter, the initial lender, Washington Mutual, as a federal savings bank, could only act through its employees and agents. To construe the term "Lender" to exclude agents would nullify every provision of the deed of trust concerning rights and duties of the lender, with the exception of section 7 (which specifies "Lender or its agent may make reasonable entries upon and inspections of the Property"). The same holds true for the current lender (alleged by the SAC to be a public security). The public security, as an entity, can only act through an agent.

A contract must be interpreted to make it "capable of being carried into effect . . . without violating the intention of the parties." (§ 1643.) A contract is interpreted against the drafter only in "cases of uncertainty not removed by the preceding rules," such as section 1643. (§ 1654.) "Stipulations which are necessary to make a contract reasonable, or conformable to usage, are implied, in respect to matters concerning which the contract manifests no contrary intention." (§ 1655.)

"Any person having capacity to contract may appoint an agent . . . ." (§ 2296.) "An agent may be authorized to do any acts which his principal might do, except those to which the latter is bound to give his personal attention." (§ 2304.) "Every act which, according to [the Civil] Code, may be done by or to any person, may be done by or to the agent of such person for that purpose, unless a contrary intention clearly appears." (§ 2305.) "An agent has authority: [¶] To do everything necessary or proper and usual, in the ordinary course of business, for effecting the purpose of his agency . . . ." (§ 2319.) "In general terms, an agent can be authorized to do any act the principal may do." (*Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 271, fn. 9.)

In sum, because a business entity can only act through an agent, section 24 of the deed of trust authorizes the lender to appoint a successor trustee by the act of its agent.

2. *The SOT*

Plaintiffs allege the SOT was void because Chase signed it as the beneficiary, rather than as an agent of the beneficiary.

The SOT provides in relevant part: "The undersigned Beneficiary hereby appoints and substitutes [National] as Trustee under the [deed of trust]." The signature block states "BENEFICIARY," with "JPMorgan Chase Bank, National Association" on the next line, followed by the signature line, "BY: Birhan Ayele, Vice President."

Plaintiffs concede that if they lose the argument the SOT was invalid, they "will have lost the case." They acknowledge that Chase is the loan servicer for the alleged public security beneficiary, and that a loan servicer is an agent of the beneficiary. (§ 2920.5, subd. (a) [mortgage servicer acts as current owner of note or owner's authorized agent].) Because we have rejected plaintiffs' interpretation of section 24 of the deed of trust, Chase was authorized to sign the SOT as the agent of the alleged beneficiary. In the SOT, however, Chase did not specify it was acting as an agent. Thus, in plaintiffs' view, the outcome of this case hinges on what is arguably a technicality, i.e., that the SOT omits the words "as agent." We are not persuaded that the foreclosure sale here must be invalidated based on this omission.

Section 2934a governs the substitution of a trustee under a deed of trust. Under subdivision (a)(1) of section 2934a, a trustee under a trust deed "may be substituted by the recording in the county in which the property is located of a substitution executed and acknowledged by: (A) all of the beneficiaries under the trust deed, or their successors in interest, and the substitution shall be effective notwithstanding any contrary provision in any trust deed executed on or after January 1, 1968 . . . ." Subdivision (d) of section 2934a provides: "A trustee named in a recorded substitution of trustee shall be deemed to be authorized to act as the trustee under the . . . deed of trust for all purposes from the date the substitution is executed by the . . . beneficiaries, or by their authorized agents. . . . Once recorded, the substitution

shall constitute conclusive evidence of the authority of the substituted trustee or his or her agents to act pursuant to this section."

Consistent with the purposes of the nonjudicial foreclosure sale statutory scheme contained in sections 2924 through 2924k,[5] section 2934a serves to (1) notify the public and the borrower (through recordation) of a trustee substitution, (2) provide the lender with an efficient procedure for substituting a trustee, and (3) protect a bona fide purchaser from claims a properly recorded substitution was invalid. Under section 2934a, substituting a trustee is a simple and binding process, whose effect can only be undone "by recording a further substitution" to change the trustee. (*Dimock v. Emerald Properties* (2000) 81 Cal.App.4th 868, 871.) Thus, the statute (1) serves the purposes of the comprehensive nonjudicial foreclosure statutory framework, and (2) minimizes confusion and litigation (see *id.* at p. 876) by establishing a bright line rule for identifying the current trustee under a deed of trust.

Section 2934a specifically permits a beneficiary's authorized agent to sign a substitution of trustee. The statute contains no express requirement for a substitution of trustee (1) to specify that the signer is acting as an agent for the beneficiary or (2) to provide the name of the beneficiary. "'Because of the exhaustive nature of [the] scheme, California appellate courts have refused to read any additional requirements into the non-judicial foreclosure statute." (*Lane v. Vitek Real Estate Industries Group* (E.D.Cal. 2010) 713 F. Supp.2d 1092, 1098 [concerning section 2923.5].)[6] We will not read any

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[5] "The purposes of this comprehensive scheme are threefold: (1) to provide the creditor/beneficiary with a quick, inexpensive and efficient remedy against a defaulting debtor/trustor; (2) to protect the debtor/trustor from wrongful loss of the property; and (3) to ensure that a properly conducted sale is final between the parties and conclusive as to a bona fide purchaser." (*Moeller v. Lien* (1994) 25 Cal.App.4th 822, 830.)

[6] This principle — that courts will not create a right where a nonjudicial foreclosure statute is unambiguously silent — has been applied in cases where a borrower

additional requirements into section 2934a. The SOT was valid and the court properly sustained the demurrers to the SAC.[7]

Plaintiffs Fail to Establish Their Complaint can Be Successfully Amended

Plaintiffs bear the "burden to show the reviewing court how the complaint can be amended to state a cause of action." (*Michaelian v. State Comp. Ins. Fund* (1996) 50 Cal.App.4th 1093, 1105.) "Here, [plaintiffs have] not apprised the court of any new information that would contribute to meaningful amendments, and [their] generalized assertion that [their] complaint can be amended . . . does not suffice to meet [their] burden of demonstrating that [they] can plead each element of" their causes of action to

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alleges defects in the chain of title to the note or deed of trust. For example, courts have held the Civil Code does not require an assignment of a deed of trust to be recorded (*Calvo v. HSBC Bank USA, N.A.* (2011) 199 Cal.App.4th 118, 122; *Haynes v. EMC Mortg. Corp.* (2012) 205 Cal.App.4th 329, 333, 336) or that the beneficiary actually possess the promissory note (*Debrunner v. Deutsche Bank National Trust Co.* (2012) 204 Cal.App.4th 433, 440-442). And, a borrower has no right, prior to a foreclosure sale, to bring a preemptive suit to test whether the initiator of foreclosure proceedings is the beneficial owner or is authorized by the owner. (*Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149, 1152, 1156; *Jenkins v. JPMorgan Chase Bank, N.A.* (2013) 216 Cal.App.4th 497, 512-513.) The instant case, however, is not a preemptive suit as a trustee's sale has already taken place.

[7] Because we affirm the court's sustaining of the demurrers on the grounds discussed above, we do not address defendants' other contentions, such as that Kim lacks standing to appeal because he is not a party to the loan or an owner of the Home, or that plaintiffs were required to plead tender in order to set aside the trustee's sale. We note, however, the recent case of *Ram v. OneWest Bank, FSB* (2015) 234 Cal.App.4th 1, 12, states that courts, in determining whether a sale is voidable (rather than void) "appear to focus on the nature and severity of the defect, omission or failure and its practical effect on the foreclosure process." Here, the nature and severity of the omission of the words "as agent" in the SOT was de minimis.

Furthermore, we do not address plaintiffs' contention Chase "agreed not to foreclose on the Home," because they raised this argument for the first time on appeal in their reply brief. (*Provost v. Regents of University of California* (2011) 201 Cal.App.4th 1289, 1296.)

which the demurrers were properly sustained. (*Ross v. Creel Printing & Publishing Co.* (2002) 100 Cal.App.4th 736, 749.)

DISPOSITION

The judgments are affirmed. Defendants shall recover their costs on appeal.

IKOLA, J.

WE CONCUR:

O'LEARY, P. J.

BEDSWORTH, J.